IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943

No. .....

WILLIAM DAVIES CO., INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

THE OPINION BELOW.

The opinion of the Court below is reported in 135 Fed. (2d) page 179, and is also part of the proceedings certified to this Court. The findings of fact and conclusions of law and order of the National Labor Relations Board appears at B.A. 319-340.

STATEMENT OF JURISDICTION.

A statement of the grounds upon which the jurisdiction of the Court is invoked appears in the foregoing petition for certiorari.

STATEMENT OF THE CASE.

The important facts necessary to an understanding of the issues argued in this brief are set forth in the foregoing petition for writ of certiorari under the heading "Summary Statement of the Matter Involved," and the statement therein contained is hereby made a part hereof.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred:

(a) In holding that the acts and conduct of the petitioner, as found by the National Labor Relations Board, were sufficient to constitute unfair labor practices within the meaning of Section 8 (1) of the Act.

(b) In holding that the petitioner discriminated in regard to hire and tenure of employment of James McNally and John Canning, thereby engaging in unfair labor practices within the meaning of Section 8 (3) of the Act.

(c) In directing the petitioner to offer to James McNally and John Canning immediate and full reinstatement to their former or substantially equivalent positions, and to make whole said employees from any loss of pay they had suffered by reason of petitioner's said alleged discrimination.

(d) In enforcing the order of the National Labor Relations Board and in not denying the enforcement thereof.

ARGUMENT.

I.

An employer has the constitutional right to express his opinion to his employees on the subject of unions and union membership.

The Circuit Court's opinion definitely limits any intrusion by the employer into a union organization campaign. This completely overlooks the effect of the decision of this Court in *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469. This Court there made it clear that the employer has the right to express its views on labor policies or problems and the penalty is not imposed because of any utterance which it has made; that the sanctions of the act are imposed not in punishment of the employer, but for the protection of the employees, but the employer is free to take any side it may choose on this controversial issue.

In *N. L. R. B.* v. *American Tube Bending Co.*, 134 Fed. (2d) 993, the Court in referring to the *Virginia Electric* case said at page 995:

> "If there was a basis for finding that such a presentation of the employer's side might be a covert threat to recalcitrants, there was as much basis in the *Virginia* case. If on the other hand the employer's interest in free speech in the *Virginia* case was thought to outweigh an actual prejudice to the employee's right of collective bargaining, the employer's interest is the same in the case at bar and the employees' prejudice no greater."

In *N. L. R. B.* v. *Ford Motor Co.*, 114 Fed. (2d) 905 (C. C. A. 6) the Circuit Court of Appeals for the Sixth Circuit definitely held that nowhere in the National Labor Relations Act is there sanction for an invasion of the liberties guaranteed to all citizens by the First Amendment and cited the following language in the case of *Thornhill* v. *Alabama*, 310 U. S. 88, 102:

> "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. Citing *Hague* v. *C. I. O.*, 307 U. S. 496; *Schneider* v. *State of New Jersey, supra.* * * *."

In *National Labor Relations Board* v. *Union Pacific Stages, Inc.*, 99 Fed. (2d) 153 (C. C. A. 9) the Court said at page 178:

> "It is difficult to think that Congress intended to forbid an employer from expressing a general opinion that an employee would find it more to his advantage not to belong to a union. Had Congress attempted so to do it would be in violation of the First Amendment, U. S. C. A. Const. Amend. 1."

So also in the case of *Humble Oil & Refining Co.* v. *National Labor Relations Board*, 113 Fed. (2d) 85 (C. C. A. 5), the Court said at page 89:

> "We do not think that the law any more than common sense, would require the employer to stand as a sheep before his shearers dumb, not opening his mouth. The right of free speech touching his own interests was involved."

II.

The acts and conduct of the petitioner in this case do not constitute unfair labor practices within the meaning of Sections 7 and 8 of the Act.

The Circuit Court indicated that it did not consider the acts committed by the Petitioner numerous or particularly flagrant, but felt that it was bound by the rule that the employer could not intrude himself in any way into the picture.

The facts found by the Board and referred to in the Court's opinion are trifling and inconsequential and were more in the nature of badinage than anything else, and without any natural tendency to interfere with, coerce or restrain, and they are wholly unworthy of the dignity with which the opinion of the Court and the findings of the Board invest them.

That they were not coercive in fact is indicated by the Union claim that the plant was approximately 100% organized (R.A. 90).

The Board placed great emphasis on the fact that the publication of notice of non-solicitation for union membership was an interference, especially because it referred to solicitation on behalf of unionization only.

The notice is addressed to employees only, and it appears from the statement therein that violators would be discharged (Ex. 3; B.A. 318). The Company could not very well threaten discharge of an apple vendor for soliciting employees to purchase apples. There was no need to post any notice as to them. There was no other rival union engaging at any time in such solicitation, and no solicitation was being or had been indulged in against the union then active. Hence there was no discrimination. There was no occasion to refer to non-existent activities.

Under the circumstances mention of solicitation for unionization only signifies nothing.

In *Midland Steel Products* v. *National Labor Relations Board,* 113 Fed. (2) 800 (6th Cir.), the Court in passing upon a notice against solicitation and a discharge predicated upon a violation of the rule, stated:

> "We think the rule is clearly reasonable. The employer has the right on his premises to demand the single minded attention of the employee to his work. In modern industry the performance of work with efficiency and without physical danger depends not only upon the devotion of the employees to their work, but also upon the amity with which they cooperate. The right of the employer to make reasonable rules for the safety and efficiency of the work includes his right to make such rules for the entire time that the working force is on the employer's premises. Solicitation, argument, the hurling of epithets, intense discussion before work has been commenced, or in the noon hour, may reasonably be expected to carry over into work hours."

The Union recognized the reasonableness of the rule by instructing their workers not to solicit on the job (R.A. 92).

The only other facts found by the Board which remotely can be construed as unfair labor practices are the discharges for alleged union activity.

As to two of these only did the Court find that there was substantial evidence. As to those two the Court was in error in finding that there was sufficient evidence. In any event, assuming that said last two mentioned discharges were not based on union activity, as we expect to demonstrate under Point III of this Argument, there is nothing in any of the facts found by the Board which either individually or collectively amounts to interference, coercion or restraint.

In determining whether the acts complained of were violative of Section 8 of the Act, the Circuit Court completely disregarded the significance of the lack of anti-union background of the petitioner. This anti-union background has been heavily stressed by this Court.

International Association of Machinists, Tool & Die Workers v. *N.L.R.B.*, 311 U. S. 72.
N.L.R.B. v. *Link Belt Co.*, 311 U. S. 588.
N.L.R.B. v. *Virginia Electric & Power Co.*, 314 U. S. 469.

In the *Virginia Electric* case, this Court did not hold that a totality of otherwise legal acts alone could support a finding of violation of the law. On the contrary, this Court emphasized that acts which might otherwise be considered lawful in themselves were proper to be considered only when there exists a wrongful background such as was present in that case, and not present in the case at bar.

The opening sentence of this court's statement of the Board's finding of fact in that case indicates our point. It is, "For years prior to the events in this case the Virginia Electric & Power Company was hostile to labor organizations" (pages 470-471).

In this case there is not a scintilla of evidence of any anti-union background. On the contrary, there is affirmative evidence that with respect to certain crafts that unions have always existed in the plant of the Petitioner. (R.A. 162), and the Circuit Court in its opinion expressly found that the company had no background of anti-union activity. The Company never refused to talk to McCarty, the organizer, when he came over (R.A. 90) or refused to bargain with him. (R.A. 90).

III.

The findings by the Board, confirmed by the Court that two employees had been discharged for union activity were not supported by substantial evidence.

The facts with respect to the discharges found by the Board and the Court below to be discriminatory are not supported by substantial evidence.

The Board impliedly admitted, and the Court expressly found that with respect to the discharge of John Canning there was no question but what Canning had not properly performed his work. The Board, however, said remarks (made to Canning two months before the discharge and before he joined the Union) by the superintendent that he knew of employees who were laid off on account of trying to organize a union,[3] and that the foreman had joked about

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[3] The testimony of the employee Canning with respect to this incident is as follows (B.A. 183; Rec. 1014):

"The Witness: No, I said a week before I joined the Union Mr. Wichmann approached me at the bench. We had a little conversation and he mentioned the fact about there is men walking the streets today that are laid off on account of trying to organize the Union.

Q. That was before you had anything to do with the Union, was it?

A. That is right.

Q. That was before there was any Union activity in the plant wasn't it?

A. Well, there was rumors going around then about there was fellows joined the Union. I didn't belong to the Union as that time and I just heard rumors a couple of times that fellows were going to start organizing the Union.

Q. And did he speak to the whole department?

A.. No, just me individually.

Q. Up in the pumping department?

A. That is correct.

(Footnote 3 continued on page 20.)

Canning's stewardship were sufficient evidence that the discharge which would otherwise be proper because based on inefficiency of the employee became discriminatory. This also in the face of a finding by the Board with respect to the employee, Balda, upon almost exactly similar circumstances with respect to the cause of discharge, that it was not discriminatory but for cause, although Balda had also joined the union (B.A. 336 and 337).

There is nothing in the record to base the finding that Canning was discharged for union activity, except the Board's suspicion in view of his union activity.

(Footnote 3 continued from page 19.)

Q. And did he say anything to you besides what you just told me?

A. Well, he asked me how long I worked there and I told him, and he asked me if I had any place that I knowed that anyone would give me a job if I lost out at Davies, and I said I don't know. And he mentioned the fact I told you about places losing out, but he says 'You have your rights and I have my rights and' he said 'this is no warning against your job' he said 'this is just a little friendly talk.'

Q. In other words, he told you, and you knew that you had your rights to do whatever you wanted to about joining the Union?

A. That is right.

Q. And Mr. Wichmann impressed that point on you at that time, didn't he?

A. That is right.

Q. And he also impressed on you the point that he was not trying to convince you one way or the other, just a little friendly discussion?

A. That is right."

and also R.A. 104; Rec. 1062:

"Q. At that conversation Mr. Wichmann told you that you had a right to join the union or do anything you wanted to about union, didn't he?

A. That is a fact."

and Canning evidently was not coerced, because he joined the Union a week after that conversation (B.A. 183; Rec. 1014).

In upholding the action of the Board with respect to the discharge of McNally, the Court holds that McNally was not discharged for violation of the non-solicitation rule because his proven activities included no words of solicitation and accordingly were not within the inhibition of the rule. This places entirely too narrow a limit upon the word "solicitation" when used in this connection. Statements calculated to persuade or encourage constitute solicitation as unmistakenly as does an entreaty.

It is clear from the record that the reason for the discharge of McNally was that he had repeatedly violated a definite rule established by the company, the scope and extent of which he clearly understood after being warned against such violation.[4]

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[4] On January 8, 1940 (2 weeks before he was discharged) the following colloquy took place between McNally and the superintendent of the plant, as shown by the testimony of McNally (B.A. 150):

"A. Well, he said he had two complaints, 'I have had two fellows complain that you have bothered them about the union, about joining the union.'

As far as I can remember now, that is just about what he stated.

Q. What did you say?

A. I said I didn't bother anybody. I didn't talk union to anybody during working hours."

And then again at B.A. 151:

"Q. Then what did he say to you in reference to your future activity?

A. Well, he asked me, he said 'Don't you know you are not supposed to talk union on the premises or during working hours?'

I said, 'I know that, but I haven't been doing it. But I can talk to them outside of working hours.'

He said, 'We don't want any of this. This is private property. You have no business talking union,' or something to that effect.

Q. And he also told you that whether you agreed with the rule or not, the company's rule was that they

(Footnote 4 continued on page 22.)

As clearly disclosed by the opinion (page 182) the Circuit Court was very doubtful whether the evidence supporting the finding of discrimination in these two cases of discharge was sufficient, but erroneously assumed it was required to uphold the Board in its finding. The court overlooked the fact that there was no evidence to sustain the Board's findings. Eliminating the mere conjecture of the Board there is none. When we have facing us a finding that the employee was inefficient, and that another employee discharged about the same time for the same type of inefficiency, was held by the Board to be properly discharged (Balda, B.A. 337), we have a clear case of failure of any evidence to substantiate the finding of discrimination.

(Footnote 4 continued from page 21.)

didn't want any talking on the company's premises, is that right, or words to that effect?

A. Yes, I believe he said something like that.

Q. And that he was merely taking this occasion to remind you of the rule, and to warn you against violating it in the future?

A. Well, I don't know what words he used, but he let me know he was warning me about it anyway.

Q. You understood at the time that the purpose of this discussion was to remind you of the rule, and warn you not to violate it in the future?

A. Yes."

Nothwithstanding this warning, he again violated this rule on January 22nd, at which time he was discharged (B.A. 140).

McNally also testified (B.A. 156):

"Q. Do you remember Mr. Brennan stating that, 'We must have respect for our rules, and men who violate them must be disciplined, and the discharge of McNally is a disciplinary measure'?

A. Yes, sir, I believe he made that statement."

The Union instructed their workers not to solicit on the job (R.A. 92).

The cases heretofore decided by this Court

N.L.R.B. v. *Nevada Consolidated Copper Corporation*, 316 U. S. 105,
N.L.R.B. v. *Link Belt Co.*, 311 U. S. 584,
N.L.R.B. v. *Automotive Maintenance Co.*, 315 U. S. 282,

are all cases where this court found that the inferences from the *evidence* were for the Board, but in each of those cases the evidence was conflicting. In the case at bar there is no conflict in the evidence that

(1) Canning was inefficient, and deliberately so;
(2) that his discharge was predicated upon such inefficiency;

or that

McNally intentionally violated a disciplinary rule promulgated by the employer in good faith and that his discharge was predicated upon such violation after explicit warning.

The only question is whether the suspicion of the Board based on their union membership or activity is sufficient to overcome the positive and uncontradicted evidence that they were discharged for proper cause.

It therefore becomes a question of law as to whether such suspicion is substantial evidence as against the direct evidence to the contrary.

In *National Labor Relations Board* v. *Columbian Enameling & Stamping Co.*, 306 U. S. 292, at 299, this Court said:

"Substantial evidence is more than a scintilla and must do more than create a suspicion of the existence of the fact to be established."

and in *National Labor Relations Board* v. *Sands Mfg. Co.*, 306 U. S. 332, this Court analyzed the evidence and demonstrated that all that there was to support the Court's find-

ings were mere suspicions and hearsay evidence which could not be the basis of a finding of substantial evidence.

The Circuit Courts of Appeal of other jurisdictions have uniformly held that the burden of proof was on the Board to show that the discharge was for union activity and the mere fact of such activity was not sufficient to overcome the positive evidence of other *bona fide* cause for discharge given by the employer.

N.L.R.B. v. *Sun Shipbuilding & Drydock Co.* (3d Cir.), 135 Fed. (2d) 15.

Martel Mills Corporation v. *N.L.R.B.* (4th Cir.), 114 Fed. (2d) 624.

N.L.R.B. v. *Williamson Dickie Mfg. Co.* (5th Cir.), 130 Fed. (2d) 260.

N.L.R.B. v. *Goodyear Tire & Rubber Co. of Alabama* (5th Cir.), 129 Fed. (2d) 661.

N.L.R.B. v. *Riverside Mfg. Co.* (5th Cir.), 119 Fed. (2d) 302.

N.L.R.B. v. *Tex-O-Kan Mills Co.* (5th Cir.), 122 Fed. (2d) 433.

Stonewall Cotton Mills, Inc. v. *N.L.R.B.* (5th Cir.), 129 Fed. (2d) 629.

Dannen Grain & Milling Co. v. *N.L.R.B.* (8th Cir.), 130 Fed. (2d) 321.

In *N.L.R.B.* v. *Williamson Dickie Mfg. Co.*, 130 Fed. (2d) 260, in discussing the question of the necessary evidence to support a finding of discrimination the court said at page 262:

> "Because of the highly explosive character of the controversies arising under the National Labor Relations Act and its enforcement, there has been much looseness and confusion of thought in its enforcement and language not only as to the meaning and effect of the section of the statute in question here, defining and prohibiting the unfair labor practice of discrimi-

natory discharging, to encourage or discourage union membership, but also as to the function of the Board as champion not only against discriminatory discharges but against discharges for cause of any members of a union whose cause, as accuser, the Board has actively espoused. The result has been an interpretation of the statute not only in union pronouncements but by employees and agents of the Board and sometimes as here, an application of it by Examiner, and Board, as a barrier not against discriminatory discharges of union men but against any discharge for a cause not deemed sufficient by Examiner or Board. Because this is so, we think it well to here restate the principles controlling the decision of this case before making their application to its facts."

The Court then cited the following language from the case of *N.L.R.B.* v. *Riverside Mfg. Co.*, 119 Fed. (2d) 302, at page 305:

"The only facts found which at all tend to support the Board's conclusion that he was discharged for union activity are that he was a member of the union, and the management did not like the union or his belonging to it and had said so. If real grounds for discharging him had not been shown, or if he had been discharged for trivial or fanciful reasons, these facts would have supported an inference that he was discharged for union activity, but when the real facts of the discharge appear, these facts are stripped entirely of probative force. For it is settled by the decisions that membership in a union is not a guarantee against discharge, and that when real grounds for discharge exist, the management may not be prevented, because of union membership, from discharging for them."

And again at page 264:

"That the statute does not make the Board either 'guardian or ruler' over employees of employer; it

does not authorize it to substitute its judgment for that of the employer as to what is sufficient cause for discharge. It empowers it only, to deliver the employees from acts and restraints forbidden by the statute, and to reinstate them when they have been discriminatorily discharged."

The foregoing epitomizes the opinions of the various Circuit Courts of Appeal on the limit of the Board's right to draw inferences, and is peculiarly applicable to the facts here. Obviously, the Circuit Court of Appeals in the case at bar did not apply the same tests in determining the sufficiency of the evidence to support the Board's order.

CONCLUSION.

It is respectfully submitted that the effect of the Circuit Court's decision is to prevent the employer, during a period of union organization, from exercising its right of free speech and, its right to discharge an employee for cause. This Court should clearly enunciate principles of law which clarify and reiterate these rights as so clarified.

Respectfully submitted,

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